

STATE OF MICHIGAN
COURT OF APPEALS

JAMES WADE and MAE STOKES-
TOWNSLEY,

UNPUBLISHED
April 1, 2008

Petitioners-Appellants,

v

No. 271953
Monroe Circuit Court
LC No. 05-019520-AA

WHITEFORD TOWNSHIP ZONING BOARD
OF APPEALS,

Respondent-Appellee,

and

WILLIAM DONNELLY,

Intervenor-Appellee.

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In June 2004, respondent Whiteford Township Zoning Board of Appeals (ZBA) granted a dimensional zoning variance to intervenor William Donnelly for the construction of a pole barn. Petitioners James Wade and Mae Stokes-Townsley appealed to the circuit court, but the circuit court dismissed petitioners' appeal. Petitioners now appeal to this Court by leave granted. We affirm.

I. Basic Facts And Procedural History

Donnelly owns property located at 5120 State Line Road in Whiteford Township. In May 2004, Donnelly filed a notice to appeal with the ZBA, seeking a variance to the Whiteford Township Zoning Ordinance § 3.15, in order to construct a pole barn on the front of his property that would exceed the size of a residence that he also planned to construct on his property. Zoning Ordinance § 3.15(3), requires, in relevant part, that an accessory building, such as a barn, not exceed the square footage of the main residence.

On June 8, 2004, the ZBA heard and discussed Donnelly's variance request. The ZBA meeting minutes provide, in relevant part, as follows:

[Donnelly] stated he is purchasing the property and has plans to build a 2400 square foot pole barn in the front of the property and then build a 1200 square foot house in the rear of the property. The barn will be used to store personal items and supplies for his woodworking business.

Jim Wade, 5204 State Line Road and Stanley Clark, 5223 State Line Road had concerns regarding the placement of the barn and property values. Discussion followed regarding location of the barn, leach field and well locations, use of barn, exterior construction of the barn and schedule of the house building. Jim Wade protested the granting of this variance.

Motion to grant the request for a variance contingent upon moving the barn to the back of the property, at least 220' from the front right away [sic], and obtaining an occupancy permit for the house by June 1, 2005 made by Robert Dickerson, supported by David Klump. Motion carried with roll call vote: David Klump-yes; Jed Miller-yes; Phil Rea-yes; Robert Dickerson-yes; James Crouch-yes.

The ZBA committed its vote to a written decision on June 17, 2004.

Donnelly began construction of the barn in July 2004 and completed it in September 2004. Petitioners filed their claim of appeal in the Monroe Circuit Court on March 4, 2005. The June 8, 2004, ZBA meeting minutes were certified on April 12, 2005. Donnelly failed to acquire an occupancy permit for his residence by June 1, 2005, so he asked the ZBA for an extension until September 2005, which the ZBA granted. Donnelly received an occupancy permit for his residence within the time allowed for under the extension. It was public knowledge that Donnelly was going to be running a business out of his residence, which is allowable under the Home Occupation Ordinance § 2.11.

At the circuit court hearing on June 28, 2006, petitioners argued that the ZBA granted Donnelly a dimensional, or nonuse, variance without a showing of practical difficulty. Petitioners also contended that the ZBA granted Donnelly a use variance without a showing of peculiar or exceptional hardship.¹ Petitioners asserted that Donnelly only wanted to run a commercial business out of his barn, which is a prohibited use, and that the ZBA knew or should have known that the barn was going to be used for commercial purposes. For instance, Donnelly immediately built the barn but failed to have the residence constructed in the time allotted by the ZBA. Petitioners wanted the barn torn down.

The ZBA argued that Donnelly did not request and was not granted a use variance. Rather, Donnelly requested and was granted a nonuse, dimensional variance, and the ZBA had evidence to support its decision. Donnelly's variance was based on the size of the barn relative

¹ "A use variance, as its name implies, permits uses of land a zoning ordinance otherwise proscribes, while nonuse variances are concerned with changes in a structure's area, height, setback, and the like." *Heritage Hills Ass'n v City of Grand Rapids*, 48 Mich App 765, 768; 211 NW2d 77 (1973).

to the size of his residence. Donnelly could have built the same size barn without a variance if he had chosen to build a bigger residence. Donnelly's practical difficulty was that he did not need a bigger house, and the ZBA did not want to force him to build a house bigger than he needed.

Donnelly's counsel argued that petitioners' appeal should be dismissed because it was untimely given that the ZBA's order was reduced to writing on June 17, 2004, and petitioners did not appeal within 21 days, as MCR 7.101(B)(1) requires. Counsel also argued that laches barred petitioners' appeal because petitioners did not appeal until March 4, 2005, long after construction of the barn was completed. Furthermore, counsel asserted that petitioners did not have standing because they did not suffer a particular injury, petitioner Stokes-Townsley failed to exhaust her administrative remedies by failing to appear at any of the Whiteford Township meetings, petitioner Wade had unclean hands because he operated a business out of his own barn, petitioners were attempting to appeal a use variance where none was granted, and the ZBA's decision was reasonable.

In response, petitioners argued that their appeal was timely, that laches did not apply, and that Donnelly's claim that there was a written order from the ZBA dated June 17, 2004, granting his variance was without merit. The document Donnelly referenced was only a notice of appeal, which no member of the ZBA signed. Petitioners claimed that they waited for the ZBA to certify its meeting minutes before appealing because the date of certification of the meeting minutes most approximates the date of entry of the order granting the variance.² Furthermore, Ordinance § 3.11, clearly states that use of the residence for a home occupation must be incidental and subordinate to its use for residential purposes; yet, according to petitioner, Donnelly built his residence after he built his barn, indicating that Donnelly was improperly using his property for a commercial purpose.

The circuit court issued its Memorandum of Law and Order dismissing petitioners' appeal on July 7, 2006. The circuit court determined that the document dated July 17, 2004, was not a final order because that ZBA did not sign it. Rather, the ZBA meeting minutes, certified on April 12, 2005, constituted the final order. Thus, the circuit court opined, "[I]t would appear that [petitioners] filed a timely appeal." However, the circuit court opined that it "could very well determine that [petitioners] lack standing in this appeal" because they failed to show that they suffered special damages not common to other similarly situated property owners. Furthermore, the circuit court stated that petitioners did not attempt to pursue injunctive relief while Donnelly was building his barn, and therefore, "it would appear that the Doctrine of laches would indeed be appropriate here." Petitioners' allegation that Donnelly was improperly using more than 20 percent of the floor area of his residence for a Home Occupation under Ordinance § 3.11 was mere speculation. Last, the ZBA did not abuse its discretion by granting Donnelly the variance because Donnelly had practical difficulties following Ordinance § 3.15(3), and the ZBA "carefully considered the impact on the general health, safety, and welfare related to the variance." The circuit court affirmed the ZBA's decision and dismissed petitioners' appeal.

² Petitioners actually filed their claim before the meeting minutes were certified. They state that they filed their claim early in an attempt to force the ZBA to certify the minutes.

Petitioners' original application for leave to appeal to this Court was dismissed on February 23, 2007. This Court held that the circuit court lacked jurisdiction to hear the appeal, where petitioners filed their appeal on March 4, 2005, but the meeting minutes, which constituted the final order, were not certified until April 12, 2005.³ Petitioners moved for reconsideration, and on April 17, 2007, this Court vacated its February 23, 2007 order, granted Donnelly's motion to intervene, and granted petitioners' application for leave to appeal.⁴

II. Laches

A. Standard Of Review

Petitioners argue that the circuit court erred in determining that the doctrine of laches applies to this case. We review de novo a trial court's determination of whether to apply the doctrine of laches.⁵ We review for clear error the trial court's findings of fact.⁶

B. Legal Standards

The doctrine of laches bars a plaintiff's claim where the passage of time combined with a change in a material condition makes it inequitable to supply a remedy to a "dilatory plaintiff."⁷ The defendant has the burden to establish that the plaintiff lacked due diligence that resulted in prejudice to the defendant.⁸ This Court evaluates each case on its own separate facts.⁹

C. Applying The Standards

Petitioners contend that they exercised due diligence, but the ZBA took nearly one year to certify the June 8, 2004 meeting minutes. Where a zoning board of appeals issues no written order granting a variance request, the date that the meeting minutes are certified most closely approximates the date that the order was entered.¹⁰ Thus, petitioners argue that they could not pursue their appeal to the circuit court until after the ZBA certified the meeting minutes on April 12, 2005.

³ *Wade v Whiteford Twp*, unpublished order of the Court of Appeals, entered February 23, 2007 (Docket No. 271953).

⁴ *Wade v Whiteford Twp*, unpublished order of the Court of Appeals, entered April 17, 2007 (Docket No. 271953).

⁵ *Shelby Twp v Papesh*, 267 Mich App 92, 108; 704 NW2d 92 (2005).

⁶ *Id.*

⁷ *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004).

⁸ *Id.* at 612; *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 494; 608 NW2d 531 (2000).

⁹ *Id.*

¹⁰ *Davenport v Gross Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995).

Regardless whether petitioners' appeal was timely, petitioners could have pursued a preliminary injunction any time after Donnelly received his building permits, which would have been based on the granted variance, or after he began construction of his barn. The purpose of a preliminary injunction is to "preserve the status quo pending a final hearing, enabling the rights of the parties to be determined without injury to either party."¹¹ Thus, a final order is not a prerequisite for the issuance of a preliminary injunction.¹²

Petitioners would have known that Donnelly began construction of his barn. Petitioners claim that they are close enough to Donnelly's property that they experience dust and vibrations from the work Donnelly does in his barn, and therefore, presumably, they were close enough to hear a barn being constructed. Once petitioners knew that Donnelly began construction of his barn, they could have moved for a preliminary injunction, which, if granted, would have prevented Donnelly from incurring any further expenses in the building of his barn until the issue was resolved. Yet, petitioners stood by inactive while Donnelly built his barn.

Petitioners assert that there was only a passage of time and no other change in condition between the construction of the barn and the filing of the appeal at the circuit court, and therefore, laches is inapplicable. However, in addition to the passage of time, between July 2004 and September 2004, Donnelly built his barn. Thus, Donnelly's expenditure of money and labor to build his barn evidenced that there was a material change in conditions.

Petitioners also argue that Donnelly was not prejudiced since he knew that his neighbors protested the construction and use of his barn, and he built the barn before the ZBA's meeting minutes were certified. Both the ZBA and Donnelly argue, on the other hand, that Donnelly was entitled to rely on the ZBA's decision at the June 8, 2004 meeting. The ZBA and Donnelly rely on *Dingeman Advertising, Inc v Algoma Twp*,¹³ in which the Supreme Court held, "Once a city or township issues a valid permit to an applicant, that applicant has every reason and right to rely thereon in his business dealings." Donnelly would have a similar right as the plaintiff in *Dingeman*. In the ZBA's meeting on June 8, 2004, the ZBA voted to grant Donnelly the variance. In addition, Whiteford Township presumably issued Donnelly building permits. Thus, it would be reasonable for Donnelly to believe that he could proceed with his project.

We conclude that Donnelly was prejudiced by his expenditure of time and money building a barn on his property. Consequently, we hold that the ZBA has carried its burden of showing petitioners lacked due diligence that resulted in prejudice to Donnelly, and therefore, the doctrine of laches bars petitioners' claim.

Last, petitioners argue that the ZBA did not suffer any prejudice, and if the ZBA cannot assert laches, then Donnelly as an intervening respondent cannot assert laches. However, the ZBA can assert laches. The doctrine of laches applies where it would be inequitable to supply a

¹¹ *Pharmaceutical Research & Mfrs of America v Dep't of Community Health*, 254 Mich App 397, 402; 675 NW2d 162 (2002).

¹² See *id.*

¹³ *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89, 98; 233 NW2d 689 (1974).

remedy to a dilatory plaintiff. In this case, petitioners should not be granted a remedy regardless of whether it was Donnelly or the ZBA that would suffer the inequity.

III. Conclusion

Petitioners assert two additional issues concerning whether the circuit court applied the correct standard of review to the ZBA's decision and whether competent, material, and substantial evidence on the record supported the ZBA's decision. Petitioners also argue that the trial court erred by determining that they lacked standing to challenge the ZBA's decision. We decline to address these issues, however, given our holding that the doctrine of laches bars their claim. Even though the circuit court erred by concluding that proper evidence supported the ZBA's decision, because dismissal was the correct result, we will uphold the circuit court's decision.¹⁴

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette

¹⁴ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).